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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of
Establishment of a Class A
Television Service

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MM Docket No. 00-10
MM Docket No. 99-292
RM -9260

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF THE UNION MISSION

The Union Mission ("TUM"), licensee of Low Power Television Stations W40AH, Chesapeake, Virginia; W21AQ, Hampton, Virginia; and W05BQ, Norfolk, Virginia, hereby files these Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding, released January 13, 2000 ("*Notice*").

I. The Commission Has Broad Statutory Discretion
To Determine Eligibility for Class A Status.

In paragraph 21 of the *Notice*, the Commission notes that while Section 336(f)(2)(A) of the Communications Act sets forth specific criteria for stations to meet the definition of "qualifying low power television station", Section 336(f)(2)(B) allows the Commission to treat other LPTV stations as "qualifying" if it determines that doing so would serve the public interest, convenience and necessity, or "for other reasons determined by the Commission". The *Notice* seeks comments on the circumstances which might warrant such a determination. As an example, the Commission asks whether a station that falls short on one of the statutorily mandated criteria should be allowed to qualify under this provision, and if so, how far "short" may a station fall?

In response, TUM initially notes that this "Public Interest or other reasons" language gives the Commission extraordinarily broad discretion to qualify LPTV stations for Class A status. Indeed, one could not even imagine language granting the Commission broader discretion than that in Section 336(f)(2)(B). That broad grant of discretion suggests that Congress did not intend Class A status to be denied to Stations that barely missed meeting the statutory criteria, or that missed meeting the criteria, but have subsequently quickly come into compliance with such criteria. For example, in its Class A certifications, TUM noted that for the 90 day period ending November 28, 1999, its Station operated in full compliance with 47 CFR Section 74.701 et seq., with two minor exceptions:

1. During the 90 day period, the Station was not in full compliance with the remote power shut-off requirements of Section 74.734(a). TUM noted that this discrepancy was subsequently remedied, as the necessary equipment has been installed, and is now operational. The Station is thus in compliance with this requirement.
2. During the 90 day period, the name and address of the Licensee was not posted at the Station's transmitter site, as required by Section 74.765(b). TUM noted that this information was subsequently posted, and again, the Station is thus in compliance with the regulatory requirement.

TUM believes that the public interest would be served by grant of Class A status for Stations in these circumstances. Certainly, with these minor discrepancies alone, the overall record of compliance by such a Station is very good, and similar to that of full power stations, and thus sufficient for Class A status. Furthermore, such discrepancies as those above were 1) few in number, 2) did not in fact negatively

impact service to the public or any other licensee, and 3) have been remedied. The Commission should use these three criteria for evaluating certifications under the “Public Interest or other reasons” standard.

Additional criteria for such Class A status evaluations could also look at the intentions and forthrightness of stations seeking qualification under Section (f)(2)(B). The Commission should at very least qualify stations that did not intentionally operate out of compliance with the statutory requirements, but rather, discovered such facts upon preparing for Class A status. Similarly, the Commission should consider positively the fact that having discovered inadvertent and limited discrepancies in the process of applying for Class A status, the Licensee voluntarily informed the Commission of these matters, and took rapid steps to come into compliance.

In sum, the Commission should use the broad discretion granted to it under Section 336(f)(2)(B) to ensure that Class A status is not denied as a result of relatively minor discrepancies that have not harmed the public or other broadcasters, and that have been corrected. Failure to use such discretion would unnecessarily deny Class A status to LPTV stations, which could undercut Congress’ goals, set forth in the “Findings” of the Community Broadcasters Protection Act (“CBPA”)¹, of promoting the delivery of local programming by LPTV stations.

¹ Intellectual Property and Communications Omnibus Reform Act of 1999, Section 5008(b).

II. The Statute Permits the Commission to Accept Class A Applications More Than 30 Days After the Enactment of Class A Rules, and the Commission Should Do So as a Matter of Policy.

In paragraph 9 of the *Notice*, the Commission seeks comments addressing whether the Commission may continue to accept and approve Class A applications from qualifying LPTV stations more than 30 days after the enactment of Class A rules, and if so, whether it should do so as a matter of policy. TUM asserts that the proper answer is “yes” on both issues. It is true that Section 336(f)(1) provides for a process wherein Class A certifications are to be filed within 30 days of the enactment of the CBPA, and Class A applications are to be filed within 60 days of enactment of Class A rules. Yet, as the Commission noted, Section 336(f)(2)(B) gives the Commission the discretion to determine an LPTV station to be qualified for Class A status under a broad “public interest” standard, “or for other reasons determined by the Commission.” This suggests that while Congress intended that the majority of LPTV stations qualify and apply according to the set deadlines, the Commission was given extraordinarily broad discretion to qualify LPTV stations under other circumstances, and under a different timing. There is other statutory evidence that Congress did not intend to limit all Class A applications to the 30 day schedule referenced in Section 336(f)(1)(C).

First, Section 336 (f)(1)(C) states that LPTV stations “may” submit applications within 30 days after the adoption of Class A rules, but it does not state that Stations seeking Class A status “shall” do so. Furthermore, Section 336(f)(6) specifically provides for the subsequent filing of Class A applications: in cases where LPTV stations have been displaced out of the core, when the Station moves back to a

channel within the core, “the Commission shall issue a class A license simultaneously with the assignment of such channel”.

The Commission’s use of the broad discretion granted by Congress to allow subsequent Class A applications would be good public policy in order to give LPTV stations a fair opportunity to obtain the Class A status necessary to achieve the goals set forth in the CBPA’s “Findings”. Specifically, for some LPTV stations, fully meeting the Class A standards will take some amount of time, due to:

- the need to raise funds necessary for full compliance with Part 73 technical requirements; and

- the shortage of the engineers and factory technicians necessary to enact the required technical changes and perform the required Part 73 proofs of performance in a very short time-span.

In sum, for the limited number of LPTV stations that seek to obtain Class A status but do not yet meet the required criteria by 30 days after the passage of Class A rules, the Commission should use its broad statutory discretion to allow the filing of such applications, and grant such applications where appropriate under a public interest standard.

III. **“Technical Problems” That Displace or Limit a Class A Protected Service Area Should Be Reasonable and Demonstrable.**

In paragraph 13 of the *Notice*, the Commission seeks comments on the statutory provisions that create exceptions to the protected service area of Class A stations. Among those provisions are technical problems requiring an engineering solution that include changing a full-power station’s channel allotment. TUM suggests,

however, that the desire to change DTV channel allotments is sometimes not based on an objective requirement, but rather on a more questionable basis. For example, it has come to the attention of TUM that some full power stations with out-of-core DTV allotments and low VHF NTSC allotments are filing petitions for rulemaking to change their out-of-core DTV allotment to an in-core channel which they would chose for their DTV operations after the transition period, with the argument that low VHF frequencies are not suitable for DTV broadcasting. TUM believes that such an approach lacks a valid engineering basis; yet if granted, such petitions could unnecessarily displace Class A stations, or reduce their protected service area. Accordingly, TUM urges the Commission to enact rules or policies so that prior to resolution of a "technical problem" by changes to DTV channel allotments that could displace or limit the protected service area of a Class A station, the DTV station must make a showing that reasonably demonstrates, using commonly accepted good engineering principles, that there is a problem, that the channel change is necessary to resolve the problem, and that it is the only solution that will in fact do so.

IV. "Off-Limit" Class A Channels Should Not Include
LPTV Stations Currently Broadcasting on Channels 2-6.

In paragraph 29 of the *Notice*, the Commission seeks comments as to whether it should interpret the requirements of the CBPA to prohibit the authorization of Class A LPTV service on channels 2-6, because such channels were added to the core spectrum in the Commission's DTV proceeding. While TUM recognizes that the Act requires reclamation of the 175 channel referenced in February 1998 *DTV*

Reconsideration Order, nothing in the Act requires that the reclaimed channels specifically include all channels 2-6. The 175 channels within the Core that are "off limits" under Section 336 (f)(6)(B) are all channels that will be recovered after the DTV transition and thus are all currently assigned to analog or digital full power stations. Accordingly, LPTV stations are currently unable operate on any of these channels because of their occupancy by full power stations. Therefore, LPTV stations currently operating on channels 2-6 are not among the "off-limits" channels, and thus the Act does not preclude any existing non-displaced LPTV station on channels 2-6 from attaining Class A status on the same channel. Such action would unnecessarily harm licensees such as TUM, who have LPTV operations on such channels.

WHEREFORE, The Union Mission requests that the Commission enact the proposals set forth above.

Respectfully submitted,

THE UNION MISSION


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